IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 256

BILLIE SOL ESTES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner, Billie Sol Estes, prays that a writ of certiorari issue to review the judgment of The Court of Criminal Appeals of Texas entered in the above entitled case, and the denial, on April 15, 1964, of petitioner's second motion for rehearing.

OPINIONS BELOW

The opinions of the court below are not yet reported and are printed herein in Appendix A. The

original opinions of the court of January 15, 1964, affirming petitioner's conviction, are printed at pp. 1a-35a, infra; the court's opinion of March 11, 1964, overruling the motion for rehearing, is printed at pp. 36a-42a, infra. Petitioner's second motion for rehearing was denied April 15, 1964, without written opinion (see Appendix A, p. 43a-44a, infra), but at the same time the court entered an order correcting its opinion on rehearing as to a misstatement of the record, printed at p 43a, infra.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered January 15, 1964. Petitioner's second motion for rehearing was denied April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether, in this case of all out publicity treatment, the construction by the Texas Court of Criminal Appeals of the Texas procedural statutes so as to deny the petitioner prior to his indictment, and afterwards on motion, the opportunity to examine the members of the grand jury for bias and prejudice against him because of such publicity, denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

2. Whether the action of the trial court, over petitioner's continued objection, denied him due pro-

cess of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.

3. Whether the trial court denied petitioner due process of law under the Fourteenth Amendment of the United States Constitution in overruling his motion for continuance and first motion for change of venue, and in requiring petitioner to go to trial, in this all out publicity case, before a trial jury whose members had received through the news media damaging and prejudicial evidence which the trial court held and certified was not admissible upon the trial, at least three of the jurors having preconceived opinions that petitioner was guilty.

4. Whether the trial court and The Court of Criminal Appeals denied petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the First Count of the Indictment, for swindling, when there was no evidence to support the offense charged in the indictment in said count.

STATUTES INVOLVED

The statutes involved are:

Articles 339, 358, 361 and 374, Revised Code of Criminal Procedure of Texas 1925 (Vernon's Annotated Code of Criminal Procedure).

Article 1, Sec. 10, of the Constitution of Texas.

Articles 560 and 566, Revised Code of Criminal Procedure of Texas 1925 (Vernon's Annotated Code of Criminal Procedure).

Texas Penal Code, Article 1411.

Texas Penal Code, Article 1418.

Texas Penal Code, Article 1545.

Canon 35 of the Canons of Judicial Ethics of the American Bar Association.

Canon 28 of the Canons of Judicial Ethics, approved by the Integrated State Bar of Texas (a State Agency).

Portion of Rules of the Court of Criminal Appeals.

See Appendix B, infra.

STATEMENT OF THE CASE

The trial and conviction of petitioner below were upon an indictment for swindling, under Chapter 16, Title 17, of the Texas Penal Code, as alleged by the First Count. (R. IV, 1-18).[1] The indictment contained four counts (for swindling, theft, theft by a bailee, and embezzlement). (First count printed in Appendix C, infra p. 53a-60a) Count IV was abandoned. Counts I, II and III were submitted to the jury with instructions that it could convict only upon *one* of the three counts. (R IV, 151).

The First Count, upon which petitioner was convicted, charged that petitioner, by means of false pretenses and devices and fraudulent representa-

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[1] The record filed in the Supreme Court is in several parts because of the hearings in the various courts, and the preliminary hearings, and is referred to as follows:

"R. I, ____" refers to proceedings held in Reeves County, Texas, prior to change of venue.

"R. II, ____" refers to proceedings held in Tyler, in Smith County, Texas, on a preliminary hearing.

"R. III, ____" refers to volumes of preliminary proceedings, at time of the trial, and jury voir dire examinations.

"R. IV, ____" refers to what in Texas is called the Transcript, which contains the pleadings, motions and court orders.

"R. V, ____" refers to the transcript of the evidence upon the trial, called in Texas, the Statement of Facts.

"R. VI, ____" refers to the proceedings in the Court of Criminal Appeals.

Original Exhibits are filed which have been sent up upon order of the trial court, and are referred to by description.

Copies of the appellant's briefs in the Court of Criminal Appeals are filed, together with an Exhibit containing particular news items referred to in the jury voir dire and briefs.

tions, induced one T. J. Wilson to sign a written instrument and to deliver the written instrument to petitioner, which instrument was valued at more than $50.00 and was the property of Wilson, and that petitioner acquired the instrument with the intent to appropriate the same to his own use and of destroying the right of Wilson who was entitled to same (R. IV, 2-8). The written instrument was set out *in haec verba* (R. IV, 2-6). The false pretenses alleged to have induced the delivery of the written instrument were (1) that Wilson by signing and executing said instrument was purchasing certain ammonia fertilizing tanks and equipment described in the instrument; and (2) that the property, as listed, secured said instrument of writing and was security thereon, which representations were alleged to have been knowingly false (R. IV, 7).

The indictment in this case was returned by the grand jury of Reeves County, Texas, and filed July 20, 1962; and transferred on the order of the trial court, over the petitioner's protest (See corrected opinion on Second Motion for Rehearing, Appendix A, infra p. 43a) to the City of Tyler, in Smith County, Texas, on July 23, 1962; and filed in Tyler on July 30, 1964 (R. IV, 19; Bystander's Bill of Exceptions No. 3 R. IV, 916-925).

Prior to the indictment in the instant case, petitioner had been indicted in Reeves County, Texas, in Cause No. 2660, together with seven other cases (Defendant's Bystander's Bill of Exceptions No. 1, R. IV, 899), and when these previous cases were called June 25, 1962, in Reeves County, Texas, de-

fendant made a conditional announcement of ready. The State elected to try Cause No. 2660, State v. Estes, involving Thomas H. Bell. A jury venire was empanneled and sworn. Thirty-two jurors were qualified by the Court after two days of interrogation. The list was scratched by the parties, and defendant asked permission to withdraw his announcement of ready, and moved the Court to pass the case for a later trial in Reeves County, Texas (Bystander's Bill No. 1, R. IV, 900).

The Reeves County District Court discharged the jury and passed the case until July 23, 1962, and announced his tentative decision to transfer the case to Smith County, Texas (R. IV, 909-910).

After the Reeves County Court decided not to proceed to trial in Reeves County, and the case was passed until July 25th, 1962 (at which future date the Court had announced his intention to transfer the case to Smith County), the defendant, on June 27, 1962, stated in open court that he had been informed that the grand jury would convene on July 10th, 1962, to consider additional indictments against him, and defendant asked for an opportunity to interrogate said grand jurors for prejudice or bias, in view of the tremendous amount of publicity since his first arrest.

The proceedings in this connection are set out in Defendant's Bystander's Bill No. 1 (R. IV, 911-914). Defendant offered in support of his request some 10 volumes of newspaper publicity, which are

part of the original Exhibits filed in the Supreme Court.[2]

Defendant was not permitted to interrogate the grand jury, and he was indicted in this case, filed July 20th, 1962 (R. IV, 19).

Before this case was transferred to Smith County, defendant, in Reeves County on July 23, 1962, moved to quash and dismiss the indictment because he was denied the opportunity to interrogate the grand jury for bias and prejudice, which was overruled (R. IV, 375-376).

On the same day, three days after the indictment was filed, the court on its own motion, over defendant's strenuous objection,[3] ordered the case moved 500 miles across the State to Smith County, where it was eventually tried.

This case was first set and called for trial in Tyler, in Smith County, Texas, on September 24th,

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[2] These original volumes are part of the Record in the State Court, and also in a Federal Case in The Western District of Texas, at El Paso. They are now (at the time of writing this Petition) part of the Record in Cause Number 20,519, Estes v. United States, pending on appeal in the United States Court of Appeals for the Fifth Circuit, and will be made available by that Court to the Supreme Court.

[3] Defendant, before the removal, offered evidence of the particular existence of prejudice in Smith County. Three witnesses from Smith County testified defendant could not get a fair trial in that County. No evidence was offered by the State, nor by the Court, supporting the move from Reeves County to Smith County. (Bystander's Bill of Exception No. 3. R. IV, 916; R. I, Proceedings on Change of Venue from Reeves to Smith County).

1962. Prior to the call of the case on that date, defendant's counsel had received notice through the press that the court upon the trial of the case intended to permit live television of the trial, and defendant's counsel notified the court that defendant desired to take up through his counsel certain matters before defendant made his appearance at the courthouse and in the courtroom (R. IV, 537).

The proceedings involving the live television of the Estes trial are shown by Defendant's Bill of Exceptions No. 5 (R. IV, 537), and by the protographs which are part of the record, and by the original television tape of a two hour broadcast the night of September 24, 1962.[4]

A fair and restrained description of what occurred in Tyler was reported by The New York Times, September 25th, 1962, as follows:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and

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[4] This tape was identified in the State Court, and made part of the Record. (R. III, 47) It was shown to the Texas Court of Criminal Appeals. Special equipment is required to show it, but attorneys for the petitioner, at the Supreme Court's request, can arrange through the Dallas broadcasting station and a Washington station for a showing of this tape.

The Broadcast of the proceedings live and upon the tape was sponsored by "Sprite" (a soft drink) (R. III, 50), Shedd Bartusch, Campbell's Soup (R. III. 51), Simonize, Bean's Eye Drops (R. III, 53), Icecapades, Rayco Seat Covers, (R. III. 54), Home Furniture, Interstate Theater, Guest Beard Murine, Readers Digest, and the Dallas Morning News (R. III, 55-56). There was estimated to be 100,000 viewers in the Dallas area (which includes Smith County), with a potential of 760,000 sets (R. III, 58).

the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates.

"A microphone stuck its 12 inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor." (See A.B.A. Report by Special Committe on Proposed Revision of Canon 35, p. 6).

The case went to trial on October 22nd, 1962, and the condition was "somewhat corrected", as shown by Bill of Exceptions No. 5 (R. IV, 546-549).

The trial court overruled defendant's objections to the live television as shown by Defendant's Bill of Exeptions No 5 (R. IV, 537-549 and Bill of Exceptions No. 6 (R. IV, 551-555).

At one point, in response to defendant's objection, the trial court made his position clear on due process. The Court said (R. III, 88):

"*I took an oath* to uphold this Constitution (Texas); not the Federal Constitution."[3]

Prior to the commencement of the trial, after the thirty-two jurors had been qualified by the Court,

[3] However, Article 16, Section 1 of the Texas Constitution prescribes the Judge's Oath, part of which reads: "and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and this State."

defendant sought to have the case continued, or to have the venire excused, to have the venue changed from Smith County. (Bill of Exceptions No. 23; R. IV, 780-871; R. III, Jury Voir Dire, for full testimony of thirty-two veniremen).

Petitioner did not take the stand and testify. (Bill of Exceptions 23, R. IV, 862) Nine of the jurors, all challenged by defendant for cause, who served on the trial jury were Hamilton, Robertson, Gordon, Holifield, Florey, Mallory, Brown, Adkins, and Nutt (R. IV, 862), and each of the nine received through news media inadmissible testimony. The trial court certified that the evidence set out in the Bill of Exceptions was received by these nine jurors outside of the courtroom and that "such information was not admissible in evidence" (R. IV, 862). Bill of Exceptions No. 23 (R. IV, 862-869) summarizes the inadmissible evidence received by each of said nine jurors, and then states: "All of the information received by the jurors, respectively, outside of the courtroom went with them into the jury room during their deliberations".

Three of the above jurors who served on the jury, Robertson, Mallory, and Nutt, before they were taken on the jury stated they had formed opinions respectively that defendant was guilty (Robertson testimony, R. IV, 796-797; the trial court certified that Robertson had an opinion it would require evidence to remove; Mallory testimony, R. IV, 866-867; Nutt testimony, R. IV, 869, R. III, 456).

Defendant exhausted all of his peremptory challenges (R. IV, 743).

The jury had made up its mind on the case when it retired to the jury room.[6]

The motions to continue, to dismiss the jury, or to change the venue were overruled, and defendant was put to trial before the foregoing jury.

All of the Federal questions were raised in the lower court, and by Briefs, Motion for Rehearing, and Second Motion for Rehearing in the Texas Court of Criminal Appeals; and all were decided against petitioner by said Court.

The stay of mandate was granted by the Court of Criminal Appeals on Motion directing attention to the Federal Questions (R. VI).

REASONS FOR GRANTING THE WRIT

1. The Denial by the Texas Court of Petitioner's Right to an Unbiased and Unprejudiced Grand Jury.

The *Texas Constitution, Article 1, Sec. 10*, guarantees to every person tried for a felony in Texas that he be indicted by a grand jury.[7]

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[6] In a very few minutes, (even though the jury had the Court's charge, R. IV, 879) "before the parties had time to complete the assembling of the Exhibits to send to the jury for its deliberations, the jury sent in a note to the Court inquiring whether the jury could convict defendant on all three counts" (R. IV, 878).

[7] As to petit jury, the Constitution uses the express words "impartial jury". As to the grand jury, the same article says "indictment of a grand jury" (See, Art. 1, Sec. 10, Appendix B, infra, p. 45a).

Beck v. The State of Washington, 369 U.S. 541, had this question before the Supreme Court, but the Court did not decide it, because the majority of the Court was of the opinion that the petitioner, Beck, had not been denied a fair and impartial grand jury by the State of Washington.

Justice Clark, writing the opinion for the Court, said:

"It may be that the Due Process Clause of the Fourteenth Amendment requires the State . . . to furnish an unbiased grand jury." (citing a number of cases)

"But we find that it is not necessary for us to determine this question (right in a State court to an unbiased grand jury); for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view —we have concluded Washington, so far as is shown by the record, did so in this case."

It is significant that all the cases cited in the Court's opinion for comparison *Lawn v. United States*, 355 U.S. 339, *Costello v. United States*, 350 U.S. 359, and *Hoffman v. United States*, 341 U.S. 478, 485. point to the basic requirement of a fair and impartial grand jury as part of due process.

That this question was reserved, and "explicitly left open" in *Beck* is shown by the dissenting opinion of Justice Harlan and Justice Clark in *Wood v. Georgia*, 370 U.S. 375, 398.

In its original opinion the Texas Court of Criminal Appeals specifically refused to give effect to *Beck v. Washington*, and citing the case says:

". . . the Supreme Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish an accused an unbiased grand jury but specifically stated that such was a question 'upon which we do not remotely intimate any view . . .'". (Appendix A, infra, p. 7a-8a).

On Rehearing the Texas Court of Criminal Appeals, met the issue squarely, and said:

"Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges". (Appendix A, p. 38a)

The Court of Criminal Appeals in its opinion says in Texas the right to challenge the grand jury array, or individual members, is confined to Articles 339, 358, 361, and 374 of the Texas Code of Criminal Procedure, and does not include the constitutional ground of "bias and prejudice". (Opinion, Appendix A. p. 7a; Statutes, Appendix B, p. 45a-52a).

The Texas Court by its decisions, despite the above statutes, would permit a challenge upon constitutional grounds for "bias and prejudice"; to a negro (*Davis v. Texas*, 374 S.W. 2d 242, decided

the same day as the *Estes case; Carter v. Texas,* (1898) 39 Tex. Crim. Rep. 345, 48 S.W. 508); to a person of Mexican descent *(Hernandez v. Texas,* 347 U.S. 475); to a member of the Catholic faith *Juarez v. Texas,* 102 Tex. Cr. Rep. 297, 277 S.W. 1091, arising during the Klu Klux era of the "twenties");* but not to petitioner who belongs to no special group.

The right to challenge for bias and prejudice, or for any reasons, presupposes the opportunity to make the challenge. See *Crowley v. United States,* 194 U.S. 461, 469, 470; also Mr. Justice Clark in *Coleman v. Alabama,* ____ U.S. ____, 12 L. ed 2d 190, 193 (headnote 2).

The opportunity is directly presented in this case for the Supreme Court to decide this question not heretofore passed on, but left open in *Beck.* And the question arises under highly prejudicial and aggravated circumstances, which this Court should act to correct.

2. The Trial Court's Requiring Petitioner Over His Objections to Submit to Live Television of His Trial.

It is the petitioner's position that the purpose of his trial was to determine his innocence or his guilt.

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*The more recent case of McClellan v. Texas, 373 S.W. 2d 674, where the right to challenge for bias and prejudice seems to be conceded, can in no way be reconciled with this Estes case. The two cases were finally decided approximately the same dates.

It would seem an uncomplicated part of due process *that he not be* needlessly humiliated and commercially exhibited, over his objection, and *required to submit to any trial procedure or technic which did not bear some fair and reasonable relation to the ascertainment of his innocence or guilt.*

If the edification of the public may be said to be an additional legitimate function of the trial of an accused, this worthy purpose (having no bearing upon determination of innocence or guilt) is certainly seriously brought in question when the interest of the television media is confined to such cases as Estes, Oswald and Ruby; to be exploited in the sale of soft drinks, soaps and soup. (See Barnett, "The Case of the Month", 49 A.B.A.J., p. 548).

A defendant in a criminal case is entitled to be tried by the law of the land, and criminal procedure is a vital part of such law for the protection of an accused. Most of these rules are fixed by statutes or court rules. No rule requires a defendant to submit to photography, television, and radio broadcast of his trial.

This question has not been passed upon by the Supreme Court; nor has the Supreme Court determined the extent to which A.B.A. Canon 35, and Federal Rules of Crim. Proc., Rule 53, (18 U.S.C.A., p. 499) give "expression to a standard which should govern the conduct of judicial proceedings". See, H. Barron, Federal Practice and Procedure, Rule Edition, p. 878; Orfield, 22 Tex. L.R. 194, 222-3; also, Report of the Special Committee on Cooperation between Press, Radio, and Bar, etc. (1937) 62 A.B.A. Ref. 851, 862-865; Galloway, "The Legislative Process in Congress", p. 234.

Chief Justice Hughes wrote, in *Brown v. Mississippi*, 297 U.S. 278: "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy. . . . (but) it does not follow that it may substitute trial by ordeal." *Cf. White v. Texas*, 310 U.S. 530.

In *Rideau v. Louisiana*, 373 U.S. 723, 726, Mr. Justice Stewart, writing for the Court, in reversing because of television of pretrial examination of the defendant, said:

"Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights."

Rideau was reversed because of a potential audience in Calcasieu Parish of 150,000, and approximately 24,000 saw and heard the broadcast. In our case the total potential was 760,000, and approximately 100,000 persons viewed the broadcast.

A courtroom proceeding should be conducted according to the standards recognized by the legal and judicial profession. The American Bar Association's Special Committee on Canon 35 has only recently recommended to the House of Delegates the retention of Canon 35. It has been said by a leader of the American Bar, and one time President of the Association, Hon. Whitney Seymore, of New York, that the exhibits and record in this Estes case were a strong influence in New Orleans in the Committee's decision. The House of Delegates of the A.B.A. on February 5, 1963, voted to adopt the recommen-

dation of the Committee for retention of Canon 35. See Editorial, "Comments on the Ruby Trial," 50 A.B.A.J., p. 454-455; *McGuigan*, "Crime Reporting", *50 A.B.A.J., p. 445.*

Chief Justice Warren, in connection with the consideration of the subject by the Judicial Conference of the United States, in a letter to Chairman John H. Yauch, of the Special Committee on Canon 35, stated that "the members of the Conference were unanimous in their belief that subjecting the courts to such practices (the taking of pictures during judicial proceedings) is inimical to the administration of justice".[10]

Mr. Justice Douglas, in 1960, speaking at the University of New Hampshire, in discussing the effect of radio and television in a trial said:

"The trial is as much of a spectacle as if it were transferred to Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth."

In a recent address before the American Society of Newspaper Editors, Mr. Justice Goldberg recommended that the newspaper code of ethics be refurbished to include standards for reporting crime.

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[10] Report of Special Committee, p. 6.

The most aggravated television of the Estes trial occurred when the defendant first appeared in the Tyler Court, and upon the application for postponement because of local publicity, which motion was overruled by the trial judge. A defendant is entitled to be free from the effects of television in the Courtroom in hearing before the judge, as before a jury.

"One is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be 'but a hollow formality' ", Justice Clark's dissent in *Rideau v. Louisiana*, 373 U.S. 723, 729.

The Texas Court of Criminal Appeals sustains its position by refusing to honor Canon 35, but announces its decision is in line with Canon 28, approved by the Judicial Section of the State Bar of Texas, September 27, 1963 (27 Tex. Bar Journal, pp. 94-95; Appendix B infra pp. 56a-57a), adopted almost a year after this Estes trial.

Texas Canon 28 permits a witness to object to having his testimony televised, but does not permit a defendant to object to such proceedings.

Professor Paulsen (of Columbia) and Kadish (of Michigan), in their text, "Criminal Law and Its Processes", 1962, Sec. C, Ch. 12, p. 1076 point out some of the reasons in support of Canon 35:

"(a) radio and television will result in 'playing to the audience' by judges, lawyers, witnesses and

jurors; (b) the 'right of privacy' of witnesses and parties will be disturbed; (c) the accused may be prejudiced by the heightened public clamor resulting from radio and television coverage; (d) the media may distort the trial by broadcasting only the sensational portions of the proceedings or selections made from a biased point of view."

The most recent application of Texas Canon 28, of Judicial Ethics, by the administrative officers of the Judicial branch of the Texas State government, has resulted in television's, and news-happy political officials', greatest, though hardly their finest, hour. As cameras whirled, and public officers "mugged", a man accused of murder in that State was publicly lynched as millions watched, in vindication of our Texas Judicial Section's guarantee of the Public's right to look, see, and witness the immolation of their fellow man.

"Lee Harvey Oswald and The Law"—"Could Lee Harvey Oswald Have Obtained a Fair Trial?". My eminent opposing Counsel, the Attorney General for the Court of Criminal Appeals, appeared recently upon a nation-wide hook-up and advanced the doctrine, and ably upheld the position, to be applied to famous crimes, and to these as to "whom there is no doubt of their guilt"; *that those so accused are entitled to no fairer trial than they can get.*

This rule of Justice, we suppose, is for "some noted culprit, on whom the sentence of a legal tribunal had but confirmed the verdict of public sentiment".

Hawthorne, "The Scarlet Letter", Chap. II, p. 49, Centenary Edition.

No one can know whether "Lee Harvey Oswald" could have gotten a fair trial. He did not get one, and now cannot; nor will any presumption of innocence hallow his Eternity. As lawyers, our answer is a simple one.

Lee Harvey Oswald could have gotten a fair trial, because our Federal and State Constitutions have guaranteed him that, and our confidence, as lawyers at the bar, is that the Supreme Court would have seen that he did. That is not the question.

The question is:

Could the State of Texas, *according the accused equal protection of the law and due process of law, in light of what occurred, have secured a conviction of Lee Harvey Oswald?*

Do we who are officers of the Court really want to abandon such sensationalism?

Against the great concrete interests in the extravagance of the "flood-lights", the press, the television industry, public relations experts, publicity-seeking officers, and attorneys for prosecution and defense, stand only the rights of the lone defendant seeking a fair trial, and the state's interest in the dignity and impartiality of its courts.

Canon 35 of the American Bar Association is a uniform rule, applied without discrimination. Only

two States, we are told, do not adhere to it. (Colorado and Texas).

It is of some significance that the "saga of Lee Harvey Oswald" was to end in one of those States. It could have occurred only in a State where public officers made arrests and arraignments under compact with news media, and men are tried and condemned under treaty between judge and "hucksters".

3. Petitioner was tried by petit jurors who received from the news media evidence which the trial court held was inadmissible upon the trial, and evidence which the jurors took with them to the jury room during their deliberations. Three of the jurors on voir dire expressed opinions that the defendant was guilty.

This case is ruled by *Irvin v. Dowd*, (1961), 366 U.S. 717; *Janko v. United States*, (1961), 366 U.S. 716; *Marshall v. United States* (1959), 360 U.S. 310; *Shepherd v. Florida*, (1957), 341 U.S. 50; *Bloeth v. Denno, Warden*, (1963, 2d Cir., en banc, 5 to 3) 313 F. 2d 364, cert. den. 372 U.S. 978; and by the more recent case of *Rideau v. Louisiana*, 373 U.S. 723.

Until the decision in this Estes case, the Texas Court of Criminal Appeals had announced and accepted the rule in the above cases, by its decision in

Williams v. State, 162 Tex. Cr. Rep. 202, 283 S.W.2d 239.

In its opinion on rehearing, the Texas Court of Criminal Appeals, having misconstrued the doctrine of *Irvin v. Dowd*, says:

> "It is the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the Williams case should be overruled."

A state court may not overrule due process of law.

The rule of due process, which the Texas Court of Criminal Appeals refuses to follow, is announced in *Marshall v. United States*, as follows:

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v. United States, 218 U.S. 245, 251, 54 L. ed. 1021, 1029, 31 S. Ct. 2, 20 Ann Cas. 1138. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. *We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence.* The prejudice to the defendant is almost certain to be as great when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. Michelson v. United States, 335 U.S. 469, 475, 93 L. ed. 168, 173, 69 S. Ct. 213, *It may indeed be greater*

for it is then not tempered by protective procedures." (Emphasis added)

As Justice Clark said in *Irvin v. Dowd*, 366 U.S. 717, 722:

"His verdict (a juror's) must be based upon the evidence developed at the trial."

Inadmissible evidence permitted to be introduced upon a trial merely presents the question of error from inadmissible testimony.

But inadmissible evidence received by a juror outside the courtroom violates due process, because a defendant is entitled to be tried by evidence offered upon a trial, to which he may object.

This is what *Irvin v. Dowd* and *Marshall* held, and it is what *Williams v. Texas* held, before it was overruled by the Court in this Estes case.

The jurors in this Estes case had received the following evidence through the news media, which the trial court in the Bill of Exceptions held was not admissible upon the trial, and which the jury carried with it in its deliberations:

(1) At least six of the jurors (Hamilton, Robertson, Gordon, Florey, Mallory, and Adkins) who served on petitioner's jury had read or heard on television that associates of petitioner in west Texas had pled guilty in the Federal Court and received heavy sentences. (R. IV, 786-869)

(2) At least eight of the jurors (Hamilton, Robertson, Holifield, Florey, Mallory, Brown, Adkins and Nutt) had heard and read about the death of Henry Marshall, an alleged witness against petitioner. The Attorney General of Texas in Franklin, Texas, was attempting to show Marshall was murdered, and attempting to implicate petitioner. One, Florey, had seen a composite picture of the alleged murderer, which was a drawing of petitioner. (R. IV, 787)

(3) One of the jurors (Robertson) had seen the television of the Courtroom proceedings in Tyler on September 24th, and 25th, 1962. (R. IV, 863-864)

(4) One of the jurors (Florey) knew that Estes had been investigated by the F.B.I. and the Internal Revenue Service, and that there was a congressional investigation, and that Estes was a friend of, and had had transactions with, several public officials in Washington. (R. IV, 865-866)

(5) At least three of the jurors (Robertson, Mallory, Nutt) had formed opinions, from the publicity prior to the trial, that petitioner was guilty. (R. IV, 864; 867; 869). All three doubted they could lay aside the opinion, and thought it would be extremely difficult.

This evidence, which the jury had from outside the courtroom through the news media, the trial court held was not admissible on the trial, and the trial court also certified that the jurors took this evidence with them to the jury room during their delibera-

tions. No room is left for surprise, since the Bill of Exceptions No. 23 (R. IV, 780, 862 and 869) approved by the trial court certifies to and fixes the error.

This is a case such as Mr. Justice Frankfurter had in mind when he referred to *Janko v. United States*, 366 U.S. 716, in *Irvin v. Dowd*, 366 U.S. 717, 730, where "such disregard of fundamental fairness is so flagrant that the Court is compelled"—to reverse this conviction "in which prejudicial newspaper intrusion has poisoned the outcome."

The outburst of the judge in the trial court that he had taken an oath to defend the state constitution, "not the federal," hardly suggested a climate in which the petitioner could be fairly tried.

4. The Evidence Showed a Different Offense, if any, from that Alleged in the Indictment.

The first count of the indictment in this case (See Appendix C, infra, pp. 53a-60a) alleges that the defendant by false pretext induced one T. J. Wilson to part with the written instrument, set out in the indictment, which was the property of T. J. Wilson and had a value in excess of $50.00.

Under the Texas statute, Article 1545, Penal Code, a man may be swindled by being induced to (a) part with a valuable right, or (b) by being induced to part with property (which includes a written instrument) belonging to the swindled person.

The indictment (R. IV, 2) in Count I, upon which defendant was found guilty, alleged the acquisition of property of T J. Wilson. The proof shows the acquisition, if anything, of his signature, which is not property, but at best a valuable right. See, *Hubbert v. Texas*, 66 Tex. Cr. Rep. 370, 147 S.W. 267; and *Johnson v. Texas*, 57 Tex. Cr. 347, 123 S.W. 143.

Under the doctrine of *Cole v. Arkansas*, 333 U.S. 201, petitioner, on the record in this case, has been denied due process. In that case the Court ruled:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried *as it would be to convict him on a charge that was never made*". (Emphasis added)

Under the evidence in this case, petitioner acquired no property from the alleged victim. Wilson was induced to lend his name and signature as credit to defendant and his associates for the payment to him (Wilson) of $7,500.00, and an indemnity and guarantee against loss.

This issue of due process is presented where the evidence is totally void of evidentiary support. See *Garner v. Louisiana*, 368 U.S. 157; *Thompson v. Louisville*, 362 U.S. 199; and *Smith v. Texas*, (D.C. Tex., S.D., Houston Division) 225 F. Supp. 150.

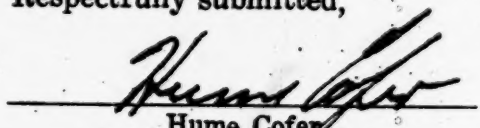
It follows that petitioner's conviction on the evidence constitutes a serious deviation from estab-

lished principles of due process of law within the meaning of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Criminal Appeals of Texas.

Respectfully submitted,



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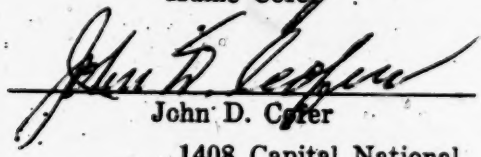

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APPENDIX A

Opinions Below

and

Clerk's Certificate

APPENDIX A

Opinions Below and Clerk's Certificate

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Smith County

Opinion

The conviction is for swindling; the punishment, eight years' confinement in the penitentiary.

Trial was in the 7th Judicial District Court of Smith County, upon a change of venue from the 143rd Judicial District Court of Reeves County, on the court's own motion.

The indictment contained four counts, count 1 charging the offense of swindling; count 2, the offense of theft, and counts 3 and 4, the offense of theft by bailee.

Upon the trial, counts 1, 2, and 3 were submitted to the jury, the state having abandoned count 4.

Count 1, under which appellant stands convicted, alleged, in substance, that on or about the 2nd day of March, 1961, the appellant did knowingly and by means of false pretense and representations made to T. J. Wilson, induce Wilson to sign and deliver to him an instrument in writing of the value of more than $50, which conveyed and secured a valuable right. The instrument set out in the indictment was a chattel mortgage from T. J. Wilson, as buyer and mortgagor, to Superior Manufacting Company on:

> "75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH
>
> "75—4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXES, WHEELS AND HOSE ASSEMBLIES.
>
> "SERIAL NO'S. SF-17214-500 THRU SF-17288-500
>
> "65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.
>
> "TANK SERIAL NO'S. 8304 THRU 8368,"

for which, according to the terms of the mortgage, the mortgagor agreed to pay the sum of $121,850, the sum of $27,350 having been paid, leaving a balance owing by Wilson of $94,500, payable in monthly installment of $1,575 each.

It was alleged that appellant did falsely and fraudulently represent to Wilson that by signing

and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing; that Wilson relied upon such representations, when in truth and in fact he was not purchasing the property and said property did not secure said nstrument and was not security thereon.

T. J. Wilson, called as a witness by the state, testified that he lived in Pecos and was engaged in the business of farming; that in January, 1961, appellant approached him relative to his using his (Wilson's) credit in purchasing fertilizer tanks and applicators and leasing them back to appellant; that appellant offered him 10% of the purchase price as a bonus rental and asked Wilson to furnish him with a financial statement; that he furnished the financial statement and later left word at appellant's office that he was not interested in the proposition; that later, on March 7, 1961, he went to the appellant's office in Pecos, at which time Harold Orr, vice-president of the Superior Tank & Manufacturing Company, of Amarillo, was present; that appellant introduced him to Orr and after some discussion he told appellant he was not interested in the transaction; that appellant then stated he would make the down payment and would be liable for the entire purchase price of the equipment, and Orr stated he would give a letter from the Superior Manufacturing Company holding the witness harmless in the event appellant did not make the payments, and appellant stated he would give a like letter.

Wilson stated that, thereupon, it was agreed that he would purchase the equipment, and appellant handed him a chattel mortgage which he signed and delivered back to appellant. State's exhibit No. 15, upon being identified by the witness as the mortgage which he signed and delivered to appellant, was introduced in evidence. The mortgage which had been duly filed in the office of the county clerk was a mortgage executed by Wilson to Superior Manufacturing Company on the equipment described in the indictment, reciting a purchase price of $121,850, with a down payment of $27,350 and balance due of $94,500, payable in monthly installments of $1,575 each.

Wilson further testified that at the time he signed and delivered the mortgage to appellant he received a check from him for $7,500 as payment for his entering into the transaction. He further testified that he signed the mortgage because of the representations made to him by appellant; that he was told that the equipment was ready for delivery and would be delivered the next morning in Hale County; that he believed the equipment listed in the mortgage was in exixstence, as represented, and that he would not have signed the mortgage had he known there was no such equipment in existence.

It was shown that no down payment was made on the mortgage contract. It was further shown that a check from C. I. T. Corporation, dated March 10, 1961, was issued to Superior Manufacturing Company in the amount of $268,431.76, for the purchase of our contracts, including the Wilson con-

tract which was purchased for $70,275, and that the proceeds of a check issued by Superior Manufacturing Company on March 13, 1961, in the amount of $268,431.76, covering the four contracts, found its way into the bank account of appellant in Pecos, Texas, on March 15, 1961.

Harold Orr, called as a witness by the state, testified that he was president of the Superior Manufacturing Company and that he and his company had an arrangement with appellant whereby the company would sell equipment on bogus contracts containing fraudulent serial numbers and send the proceeds of such sales to appellant. Orr testified that in the transaction with the state's witness Wilson, it was represented that the tanks would be delivered that day or the next and that in the transaction Superior Manufacturing Company received $70,250 from C. I. T. Corporation, which money was sent to appellant. He further swore that the property and equipment purchased by Wilson was never delivered; that, in fact, such property was never in existence; and that the company never manufactured any tanks having serial numbers indicated in state's exhibit No. 15. He stated that such numbers were "made up" and that, in fact, there was no such equipment.

Appellant did not testify and, other than certain exhibits introduced, offered no evidence in his behalf.

Appellant urges six points of error in support of his contention that certain actions and rulings

of the court denied him a fair trial and due process of law under the Constitution of this State and the United States.

We shall discuss the contentions in the order in which the same were presented at the trial.

Presented by bystanders' bill of exception No. 1 and formal bill of exception No. 2, appellant's first contention is that the District Court of Reeves County erred in refusing to permit him to interrogate the grand jurors after they were impaneled and before they returned the indictment, as to their bias and prejudice against him because of widespread publicity given his case by the news media, and in later overruling his motion to quash and dismiss the indictment because of publicity in the case which, it is charged, denied him a fair and impartial hearing before the grand jury.

It is the appellant's contention that the court's action in refusing to permit his examination of the grand jurors as to bias and prejudice constituted a denial of due process and equal protection of the law.

Art 339, V.A.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Art 358, V.A.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as grand juror. In no other way shall ob-

jections to the qualifications and legality of the grand jury be heard.

Under Art. 361, V.A.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Art. 362, V.A.C.C.P.: that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Art. 374, V.A.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under the statutes, bias or prejudice is not a ground for challenge of a grand juror in this state, and the court did not err in refusing to permit appellant to examine the grand jurors with reference to such matters, prior to the return of the indictment against him.

We do not agree that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Art. 1, Sec. 10, of the Constitution of this State and in violation of the Constitution of the United States.

In Beck v Washington, 369 U. S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, cited by appellant, the Supreme

Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish to an accused an unbiased grand jury but specifically stated that such was a question "upon which we do not remotely intimate any view. . . ."

Error is urged by appellant in his bystanders' bill of exception No. 3 to the action of the District Court of Reeves County in changing venue of the cause, on its own motion, to Smith County.

The bill of exception and record reflect that prior to ordering the change of venue, a jury panel of thirty-two names had been selected in the trial of another criminal case then pending against appellant in said court. At such time appellant asked permission to withdraw his announcement of ready and moved the court to pass the case until such time as conditions in the county resulting from publicity should abate. Thereupon, the court discharged the jury panel and announced his tentative decision to transfer the case and three other causes pending against the appellant to Smith County.

Appellant filed his opposition to such a change of venue and attached the affidavit of three citizens of Smith County, which is more than five hundred miles from Reeves County, who swore that he could not get a fair and impartial trial in that county.

After a hearing in which the three compurgators testified in opposition to the change of venue, the court entered its order changing venue in the in-

stant case and in three other cases pending against appellant—all upon new indictments that had been returned by the grand jury—to Smith County, which order recited that it appeared to the court that a trial alike fair and impartial to the accused and to the state, could not be had in Reeves County because the case had received such widespread publicity in the county and because of the special knowledge and information of the citizens of the county resulting from Reeves County being the residence of both the appellant and the state's witnesses. The court further found and recited in the order that the courthouse of Loving, being the nearest to the courthouse in Reeves County, was subject to the same objection; that a fair and impartial trial to the accused and to the state, alike, could not be had in that county; and that said condition existed in all other counties adjoining Reeves County and in the adjoining judicial districts.

The order entered by the court was in compliance with Arts. 560 and 566, V.A.C.C.P., which provides:

(Art. 560 "On court's own motion . . .

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

(Art. 566) "If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

It has been the holding of this court that under these articles the district judge is vested with a discretion which, although it is judicial and not a personal one, will not be interferred with unless abused. Mayhew v. State, 155 S. W. 191; Mills v. State, 59 S. W. 2d 147.

In Spriggs v. State, 289 S. W. 2d 272, we said:

"There is perhaps no provision in our laws which places in the hands of a trial judge more inherent power than does this statute [Art. 560, supra], for he can exercise the authority there conferred when he is 'satisfied . . . from any cause' that a trial fair to the accused and to the state cannot be had in the county where the case is pending.

The record in the instant case, showing that before the court ordered venue changed on his own motion a jury panel had been selected in another case pending against appellant in Reeves County and discharged at his request because of widespread publicity in the county, demonstrates to us that the court did not abuse his discretion in changing the venue to Smith County.

By bills of exception No. 4 and No. 23, appellant complains of the court's action in overruling his motions, *made after the jury panel had been selected* in Smith County to discharge the panel and postpone the case or change the venue.

In the motions, appellant alleged that because of widespread publicity given to him and the case by the news media in Smith County, he could not receive a fair and impartial trial. It was alleged that they had read newspapers, followed television publicity, and received information from magazines and other sources as to matters of purported facts in the case which were not admissible at the trial. It was also alleged that of those selected on the panel, twenty-six members thereof testified that they had learned and received facts which were not admissible on the trial of the cause.

In support of such motions, numerous exhibits were offered, consisting of newspaper clippings and photographs concerning appellant and the case pending against him. Many of the newspaper clippings pertained to a grand jury investigation in Robertson County in connection with the death of one Henry Marshall, a United States Department of Agriculture employee, and connected appellant with the inquiry. Other articles dealt with the investigation of appellant's activities in Washington and congressional committees and the interest of both the President and the Attorney General of the United States in the investigation. Other newspaper articles dealt with the business dealings of appellant and his associates and criminal charges against them.

Appellant also called witnesses who resided in Smith County who testified that they had heard purported facts about the case on television and radio; that they had read purported facts about the case in the newspapers; and that they had heard the case discussed, and expressed the opinion that appellant could not receive a fair trial in the county.

The voir dire examination of the jury panel was adopted by appellant for purposes of the motion. Included in the record is the voir dire examination of thirty-two members of the panel. A reading of their voir dire examination reflects that most of them had read in newspapers or magazines or had heard on radio and television, including a telecast of the preliminary hearing on September 24 and 25, certain purported facts about the case, but each satisfied the court that he could lay aside any opinion he had formed about the case and render a fair and impartial verdict if taken as a juror in the case.

Appellant's motions for postponement and change of venue were controverted by the state through its district attorney and the affidavit of two other citizens of Smith County who swore that in their opinion the appellant could receive a fair and impartial trial.

The motion for postponement was in fact a second motion, the case having been previously postponed by the court on motion of appellant, because of the absence of witnesses.

Such motion was not a statutory motion but was on grounds addressed to the discretion of the trial

judge. Trapper v. State, 84 S. W. 2d 726; Gordy v. State, 268 S. W. 2d 126; and McIntyre v. State, 360 S. W. 2d 875. A review of the record does not disclose an abuse of discretion by the trial court in refusing to postpone the case.

Appellant insists that the court's action in overruling his motion for change of venue presents error because the vior dire examination of the jurors reveals that nine members of the jury had read certain inadmissible facts about the case. Reliance is had upon Williams v. State, 283 S. W. 2d 239, and to the rule stated in the syllabus, as follows:

> "Where voir dire examination revealed that at least five members of the jury selected to try rape case had read newspaper accounts containing inadmissible facts, and after defendant had used all his challenges he was required to accept a juror who had read the accounts, it was reversible error to deny motion for change of venue."

While the voir dire examination of the nine jurors discloses that they had read in newspapers and magazines and heard on radio and television certain purported facts about the case which would have been inadmissible upon the trial, none of the jurors were shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. Herring v. State, 302 S. W. 2d 428; Klinedinst v. State, 265 S. W. 2d 593; Pugh v. State, 186 S. W. 2d 258.

The opinion in Williams v. State, supra, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the Williams case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. Everett v. State, 218 S. W. 2d 471; Jones v. State, 243 S. W. 2d 848; Johnson v. State, 244 S. W. 2d 235; Goleman v. State, 247 S. W. 2d 119; Aaron v. State, 275 S. W. 2d 693; Slater v. State, 317 S. W. 2d 203; Moon v. State, 331 S. W. 2d 312; Philpot v. State, 332 S. W. 2d 323.

There is no such showing in the present case. No error is presented in the bill.

By bills of exception Nos. 8, 9, 12, 16, 17, 18, 20, 21, and 22, appellant insists that the court erred in overruling his challenge for cause of the veniremen Owens, Shapley, Johnson, Freeman, Conant, Betts, and Swann, all of whom appellant peremptorily challenged, and to the veniremen Robinson and Mallory, whom appellant was unable to strike (having exhausted his peremptory challenges) and who did serve on the jury, on the ground that all of the veniremen had formed opinions as to appellant's guilt, which would influence their verdict in the case.

Art. 616, V.A.C.C.P., enumerates the reasons for challenge for cause to any particular juror, and, in subdivision 13, provides:

> "That from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

We have carefully read the voir dire examination of each of the above-named veniremen. Some stated that they formed no opinion as to the guilt or innocence of appellant, while others stated that from reading newspaper accounts and magazines and watching television they had formed some opinion about the appellant and his guilt or innocence.

Those prospective jurors who indicated that they had formed some opinion about the case stated that they could lay such opinion aside and follow the evidence and the court's charge in rendering their verdict.

It is apparent that the trial court was satisfied that each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse of discretion is shown on the part of the court in holding the veniremen qualified. Burkhalter v. State, 247 S. W. 539; Pugh v. State, 186 S. W. 2d 258; Klinedinst v. State, supar; Howell v. State 352 S. W. 2d 110.

By formal bills of exception Nos. 10, 13, and 14, appellant complains that the court erred during the voir dire examination in interrogating and instructing some of the veniremen with reference to their qualification as prospective jurors in the case. It is appellant's contention that by such action the court conveyed to the jurors his opinion in the case, in violation of Art, 707, V.A.C.C.P.

The bills reflect that during the voir dire examination the court inquired of some of the veniremen if they could lay aside any opinion they had formed about the case and base their verdict upon the law and evidence; inquired of some if they had any opinion as to the guilt or innocence of appellant; instructed some of the veniremen that the indictment was no evidence of guilt and that they would

be so instructed in the charge; asked if they could follow the court's instruction and not consider the indictment as any evidence of guilt; and instructed the veniremen that the burden of proof was on the state and it must prove the defendant guilty beyond a reasonable doubt.

The bills further reflect that in each instance when the court made an inquiry or gave an instruction, the prospective juror was in doubt as to his answers given to certain questions propounded to him by counsel.

Under the record, the court was well within his province in questioning the jurors and explaining to them various phases of the law governing the case. In 35 Tex. Jur. 2d 149, Sec. 97, it is stated:

> ". . . where the qualifications of a juror, and especially his mental attitude toward defendant, have been left in doubt by the examination of counsel, it is not only the right, but may also be the duty, of the judge to question the juror further."

See also, King v State, 64 S. W. 245.

We do not agree that the court's statement conveyed to the prospective jurors his opinion as to any phase of the case or the answers which they should give to the questions then being propounded to them.

By bills of exception Nos. 5 and 6, appellant complains of the court's action in permitting live

television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a continuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks and KRLD

television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to preceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In Ray v. State, 221 S. W. 2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom.

In Farrar v. Stote, 277 S. W. 2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant.*

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

By points of error Nos. 7 to 15, appellant complains of other rulings made by the court during the trial and of the court's charge to the jury.

It is first urged that the court erred in not requiring the state to elect upon which count in the indictment it would go to the jury in seeking a conviction of appellant. While separate offenses were charged in the three counts, only one act or transaction was alleged, that being the acquisition by appellant of the instrument in writing.

Under the general rule in this state, the state is not required to elect where the same act or transaction is charged in different counts of an indictment to meet possible variations in the proof. See: 30 Tex. Jur. 2d, Sec. 46, pages 617-620; Davis v. State, 321 S. W. 2d 873; McKinnon v. State, 261 S. W. 2d 335.

We do not construe Art. 1549, V.A.P.C., as amended in 1943, which provides:

> "Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending shall be amenable to prosecution at the state's election for swindling or for such other offense committed by him by the unlawful acquisition of said property in such manner,".

as requiring the state to elect as to which offense it would prosecute but only permitting the state to elect as to whether it would prosecute for swindling or some other offense. Prior to the 1943 amendment of the statute the state had no right to elect but was required to prosecute for the other offense. Nor do we agree that an election was required, because under the court's charge appellant could be convicted under any of the three counts submitted upon the law of co-principals. Johnson v. State, 8 S. W. 2d 121, and the other authorities cited by appellant in support of his contention that the state should have been required to elect, in view

of the court's charge on principals, are not here applicable, because, in the case cited separate transactions and offenses are shown.

The court did not err in refusing to require the state to elect, and fully protected the appellant in instructing the jury in his charge that they could convict him only on one count in the event they found him guilty.

In his point of error VIII, appellant urges a fatal variance between the fraudulent inducement alleged in the indictment (that Wilson was induced to sign and deliver the mortgage upon appellant's representation that he was purchasing the property and that said property was security for the mortgage) and the proof offered upon the trial when Wilson testified that the entire transaction and not any one factor was the inducement for his entry into the transaction. While Wilson did testify that it was the entire transaction, including the $7,500 payment made to him and the representations of both appellant and Orr to him, which induced him to sign and deliver the mortgage, he swore positively that he signed the mortgage because of representations made to him by appellant that the property was ready for delivery and that he believed the property was in existence, as represented. In order to constitute swindling it is not necessary that the false pretense should be the sole inducement which moves the injured party to part with his property. 5 Branch's Ann. P. C. 2d at p. 344, Sec. 2827; Blum v. State, 20 Tex. App. 578; McFarland v. State, 75 S. W. 788; Noblitt v. State, 281 S. W. 849. A

further claim of variance is urged by appellant because state's exhibit No. 15, introduced in evidence, bore a number: "5-601C (4-60)" in the left top corner of the instrument, which number was not set out in the indictment in copying the mortgage according to its tenor. Such variance was not fatal, as the number was not a material part of the instrument, proper, and it was unnecessary for the state to allege the number in the indictment. 3 Branch's 2d, Sec. 1588; Anderson v. State, 161 S. W. 2d 88; Pate v. State, 361 S. W. 2d 875.

The further contention is made by appellant that state's exhibit No. 15, for various reasons, was not binding on Wilson as maker and therefore the instrument had no value. We need not discuss the reasons urged by appellant as to the invalidity of the instrument, as the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of $94,500 and that after he signed the same it was re-copied at the direction of Orr and, as re-copied, sold by Superior Manufacturing Company to C. I. T. Corporation for $70,275. Such instrument was shown to have a value in excess of $50.

Appellant's remaining points of error relate to the court's charge.

In his charge to the jury, the court defined the offense of swindling substantially as the same is defined in Art. 1545, V.A.P.C., and set out in the charge seven essential elements of the offense. While the court's definition omitted the words, "goods,"

"services," and "any other thing of value," found in the statute, such omission was not called to the court's attention and does not present reversible error. The court also fully charged the jury on the law of principals.

In paragraph 3 of the charge, the court submitted to the jury the issue of appellant's guilt under count 1 of the indictment and instructed the jury that if they believed from the evidence beyond a reasonable doubt that the appellant either himself or acting as a principal, as the term was defined for them, on the date alleged

> "by means of the alleged false pretenses, devices and fraudulent representations specifically set out in the *first count* of the indictment, did then and there by means of said false pretenses, devices and fraudulent representations, if any, acquire from the said T. J. Wilson said instrument of writing with said signature affixed thereto, and you further believe, beyond a reasonable doubt, that said false pretenses, devices and representations, if any, were relied upon by T. J. Wilson, and did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's signature on the instrument of writing, alleged in the indictment, and did induce the said T. J. Wilson to deliver to him, the said BILLIE SOL ESTES, said instrument of writing with the intent to appropriate the said instrument of writing to the said BILLIE SOL ESTES' own use, and that said instrument of writing conveyed and secured a valuable right, and that said instrument of writing was then and there of the value of more than $50.00 and

was the property of T. J. Wilson, and the said BILLIE SOL ESTES did so acquire said instrument of writing by then and there falsely pretending and fraudulently representing to the said T. J. Wilson that he, the said T. J. Wilson, by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, and that said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, then you will find the Defendant guilty of swindling as charged in the first count of the indictment and assess his punishment at confinement in the State Penitentiary for a term of not less than two nor more than ten years. Unless you so find, or if you have a reasonable doubt thereof, you will acquit the Defendant."

In paragraph 4, the court instructed the jury that if they believed from the evidence or had a reasonable doubt thereof that appellant did not by means of the alleged false pretenses and devices induce Wilson to sign and place his name on the instrument or that the appellant did not make any false pretenses or representations to Wilson, or if they believed that appellant at the time of receiving the instrument had no intent to appropriate it to his own use and benefit, or if they believed that the said instrument of writing did not convey or secure a valuable right and that said instrument was not of the value of more than $50, or if they believed that the instrument of writing was not the property of T. J. Wilson, they should acquit the appellant and say by their verdict, "Not Guilty."

In paragraphs 21-A, 21-B, 21-C, 21-D, 21-E, and 21-F, the court submitted certain affirmative defenses to the jury.

In paragraph 21-A, the jury were told to acquit appellant if they believed from the evidence or had a reasonable doubt thereof that when Wilson signed, executed, and delivered state's exhibit No. 15, he knew he was not purchasing the property specified therein.

In paragraphs 21-B, 21-C, 21-D, 21-E, and 21-F, the jury were told that if they believed from the evidence or had a reasonable doubt thereof that the sole reason or reasons for Wilson's signing state's exhibit No. 15 was the payment of $7,500 by the appellant to him, or because appellant executed and delivered to him his written contract of equipment lease covering the identical equipment described therein, or because Superior Manufacturing Company gave him a letter of indemnity, or because appellant promised to pay all installments to become due on state's exhibit No. 15, then to acquit him of the offense charged in count 1 of the indictment.

Appellant insists that the court erred in submitting such defense issues upon the theory of "sole reason" for Wilson's signing state exhibit No. 15, rather than upon the theory of "inducing cause," as requested by him in his requested charges Nos. 3, 4, 5, 6, and 7. The requested charges would have instructed the jury to acquit appellant if they found that Wilson was induced to enter into the trans-

action and sign state's exhibit No. 15 because of the $7,500 payment or certain other specified reasons but for which he would not have executed the same.

We are unable to agree that the theory upon which the court submitted the affirmative defense was erroneous. The ultimate issue to be determined by the jury was whether the alleged false pretext was an inducing cause for Wilson's entering into the transaction. If there were other inducements which were the "sole reasons" for Wilson entering into the transaction, no offense was committed and appellant was entitled to an acquittal. This theory was given to him in the affirmative defenses submitted by the court.

In the cases relied upon by appellant, a defensive issue raised by the evidence was not submitted to the jury. Such is not the case at bar, because, as shown above, every affirmative defense raised by the evidence was submitted to the jury.

Complaint is made to the court's refusal to give certain defensive charges requested by appellant. We have examined each requested charge and find no reversible error in the court's action in refusing to give the same. Some of the charges would have been upon the weight of the evidence. Some were not called for by the evidence and the others were adequately covered by the affirmative defensive issues submitted to the jury.

The court's failure to define the term "property," as defined in Art. 1418, V.A.P.C., does not present error. Under the indictment and court's charge the jury were required to find, before convicting, that appellant did by means of false pretenses and fraudulent representations acquire the *instrument of writing* set out in the indictment. A definition of "property" would not have aided the jury in passing upon the issue.

Nor did the court err in refusing to instruct the jury that the state's witnesses C. M. Wesson and Adam Garcia, both of whom were employees of appellant, were accomplice witnesses as a matter of law. While Wesson testified that, after the date of the alleged offense, at appellant's request and direction, he changed certain serial numbers on anhydrous tanks, and Garcia testified that he changed certain numbers under Wesson's direction, neither witness was shown to have had any knowledge of the representations made by appellant to the injured party, Wilson. The court correctly submitted to the jury the issue as to their being accomplices and did not err in refusing to instruct the jury that they were accomplices as a matter of law.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered January 15, 1964)

Opinion approved by the court.

Concurring Opinion

In view of the fact that I prepared for the court the opinion in Williams v. State, 283 S. W. 2d 239, and because appellant relies so strongly upon such case, I deem it proper to make the following observations:

The record in Williams reflects that the case had received publicity only in Matagorda County newspapers and in the adjacent area. The offense was committed, the case tried in Matagorda County, and the jurors stated they had read newspaper accounts of the case, and the voir dire examination revealed that they did not enter the jury box with open minds. After the reversal by this Court with instructions to change the venue, Williams was again tried, this time in Wharton County (Williams v. State, 298 S. W. 2d 590), and there was an absence of any showing that the Wharton County jury did not enter the jury box with an open mind.

Appellant contends, without any suggestion from him as to where the case should be sent, that the court erred in overruling his motion to change venue from Smith County to some other county in the State because of the wide-spread publicity which the case had received, and that he was thereby forced to accept jurors who, through news sources, had received inadmissible evidence which was not offered

at the trial. The answer to this contention would seem to lie in the exhibits introduced by appellant:

[1] ANDERSON COUNTY
Palestine Herald-Press
ANDREWS COUNTY
Andrews County News
ANGELINA COUNTY
Lufkin News
BAILEY COUNTY
Muleshoe Journal
BASTROP COUNTY
Bastrop Adviser
BAYLOR COUNTY
Baylor County Banner
(in Seymour)
BEE COUNTY
Beeville Bee-Picayune
BELL COUNTY
Temple Cen-Tex Record
Killeen Daily Herald
Temple Telegram
BEXAR COUNTY
San Antonio News
San Antonio Express
San Antonio Light
BOWIE COUNTY
Bowie County News
(in New Boston)
Texarkana Daily News
Texarkana Gazette
BRAZORIA COUNTY
Brazos Port Facts
(in Freeport)
BRAZOS COUNTY
Bryan Eagle
The Battalion
(in College Station)
BRISCOE COUNTY
Briscoe County News
(in Silverton)
BROWN COUNTY
Brownwood Bulletin
CALLAHAN COUNTY
Cross Plains Review
CAMERON COUNTY
Brownsville Herald
Harlingen Press
Harlingen Star
CAMP COUNTY
Pittsburg Gazette
CARSON COUNTY
Groom News
Panhandle Herald
CHEROKEE COUNTY
Rusk Cherokeean
Cherokeean Star-Journal
(in Jacksonville)
Jacksonville Progress
CHILDRESS COUNTY
Childress Index
CLAY COUNTY
Henrietta Record
COLEMAN COUNTY
Santa Anna News
COLLINS COUNTY
Frisco Journal
Farmersville Times
McKinney Courier-Gazette
COMANCHE
De Leon Free Press
CORYELL COUNTY
Four County News
(in Evant)
Gatesville Messenger
Coryell County News
(Gatesville)
CROSBY COUNTY
Ralls Banner
Lorenzo Tribune
DALLAM COUNTY
Dalhart Texan
DALLAS COUNTY
Dallas Morning News
Garland Daily News
Grand Prairie Texan
Park City News (in Dallas)

Richardson News
Garland Herald
Grand Prairie News-Texan
Dallas Times-Herald
DAWSON COUUNTY
Lamesa Reporter
DEAF SMITH COUNTY
Hereford Sunday Brand
DENTON COUNTY
Lewisville Leader
Denton Record-Chronicle
DE WITT COUNTY
Cuero Record
ECTOR COUNTY
Odessa American
ELLIS COUNTY
Waxahachie Light
Ennis News
Palmer Rustler
Italy News-Herald
EL PASO COUNTY
El Paso Herald-Post
El Paso Times
ERATH COUNTY
Stephenville Daily Empire
Stephenville Empire
FALLS COUNTY
Marlin Daily Democrat
FANNIN COUNTY
Bonham Favorite
FLOYD COUNTY
Floyd County Hesperian
(Floydada)
FORT BEND COUNTY
Fort Bend Reporter
(in Rosenberg)
FREESTONE COUNTY
Wortham Journal
Fairfield Reporter
FRIO COUNTY
Pearsall Leader
GAINES COUNTY
Seminole Sentinel
GALVESTON COUNTY
Texas City Sun
La Marque Manland Times
Galveston Tribune
Galveston News
GONZALES
Gonzales Daily Inquirer
Nixon News
Waelder Home Paper
GRAY COUNTY
Pampa Daily News
Pampa Daily
Pampa News
GRAYSON COUNTY
Whitewright Sun
Sherman Democrat
Dension Herald
GREGG COUNTY
Longview News
Kilgore News-Herald
Gladewater Daily Mirror
Longview News-Journal
GUADALUPE COUNTY
Seguin Enterprise
HALE COUNTY
Plains Farmer
(in Plainview)
Petersburg Journal
Plainview Herald
HAMILTON COUNTY
Hico News Review
HARDEMAN COUNTY
Quanah Tribune-Chief
HARDIN COUNTY
Silsbee Bee
The Oil City Visitor
(in Sour Lake)
HARRIS COUNTY
Houston Chronicle
Houston Press
Pasadena Citizen
Baytown Sun
Highland Star
Houston West Side
Reporter
Houston Post
HARRISON COUNTY
Marshall News-Messenger
HAYS COUNTY

San Marcos Record
HENDERSON COUNTY
Malakiff News
Athens Daily Review
HIDALGO COUNTY
Edinburg Daily Review
Weslaco News
Valley Evening Monitor
(in McAllen)
Mission Times
HILL COUNTY
Hillsboro Evening Mirror
HOCKLEY COUNTY
Levelland Sun-News
HOPKINS COUNTY
Sulphur Springs News-Telegram
HOWARD COUNTY
Big Spring Herald
HUNT COUNTY
Greenville Herald-Banner
HUTCHINSON COUNTY
Borger News-Herald
JACK COUNTY
Jacksboro Gazette-News
JASPER COUNTY
Jasper News Boy
JEFFERSON COUNTY
Port Arthur news
Beaumont Enterprise
JIM WELLS COUNTY
Alice Daily Echo
JOHNSON COUNTY
Cleburne Times-Review
JONES COUNTY
Stamford American
KERR COUNTY
Kerrville Times
KIMBLE COUNTY
Junction Eagle
KLEBERG COUNTY
Kingsville Record
LAMAR COUNTY
Paris News
Deport Times
LAMB COUNTY
County Wide News
(in Littlefield)
Olton Enterprise
Lamb County News
(in Littlefield)
LA SALLE COUNTY
Wortham Journal
LAVACA COUNTY
Lavaca County Tribune
(in Hallettsville)
New Era Herald
(in Hallettsville)
Shiner Gazette
LEON COUNTY
Leon County News
(in Centerville)
LIBERTY COUNTY
Liberty Vindiction
LIMESTONE COUNTY
Groesbeck Journal
Mexia Daily News
LUBBOCK COUNTY
Lubbock Avalanche-Journal
Lubbock Avalanche
MADISON COUNTY
Madisonville Meteor
MARTIN COUNTY
Stanton Reporter
MATAGORDA COUNTY
Bay City Tribune
MAVERICK COUNTY
Eagle Pass News Guide
McLENNAN COUNTY
Waco News-Tribune
Mart Herald
Riesel Rustler
Waco Times-Herald
Waco Tribune-Herald
MIDLAND COUNTY
Midland Reporter-Telegram
MILAM COUNTY
Rockdale Reporter
MONTAGUE COUNTY
Bowie News
MONTGOMERY COUNTY
Conroe Courier

MOORE COUNTY
Moore County News
(in Dumas)
MORRIS COUNTY
Naples Monitor
NACOGDOCHES COUNTY
Nacogdoches Daily Sentinel
NAVARRO COUNTY
Corsicana Sun
Kerens Tribune
Corsicana Semi-Weekly
Light
NOLAN COUNTY
Sweetwater Reporter
NUECES COUNTY
Corpus Christi Times
Corpus Christi Caller
Corpus Christi Star
Corpus Christi Caller-Times
OCHILTREE COUNTY
Ochiltree County Herald
(in Perryton)
OLDHAM COUNTY
Vega Enterprise
ORANGE COUNTY
Vidor Vidorian
Orange Leader
PALO PINTO COUNTY
Mineral Wells Index
PARKER COUNTY
Weatherford Democrat
PECOS COUNTY
Fort Stockton Pioneer
POLK COUNTY
Polk Enterprise
(in Livingston)
POTTER COUNTY
Amarillo Citizen
Amarillo Daily News
REEVES COUNTY
Pecos Independent
Pecos Independent
and Enterprise
Pecos Daily News
ROBERTS COUNTY
Miami Chief
ROBERTSON COUNTY
Franklin Texan
Colvert Tribune
Hearne Democrat
RUNNELS COUNTY
Winters Enterprise
RUSK COUNTY
Henderson Daily News
SAN PATRICIO COUNTY
San Patricio County News
(in Sinton)
SCURRY COUNTY
Snyder News
SHELBY COUNTY
East Texas Light
(in Tenaha)
Center Champion
SMITH COUNTY
Tyler Courier-Times
Tyler Star
Tyler Courier-Times-
Telegraph
STEPHENS COUNTY
Breckenridge American
SUTTON COUNTY
Devil's River News
(in Sonora)
SWISHER COUNTY
Tulia Herald
TARRANT COUNTY
Fort Worth Press
Arlington Journal
Fort Worth Weekly
Livestock Reporter
Fort Worth East Side
Times
Fort Worth Star-Telegram
TAYLOR COUNTY
Abilene Reporter
Merkel News
Jim Ned Valley Reporter
(in Tuscola)
Abilene Reporter-News
TOM GREEN COUNTY
San Angelo Standard-
Times

(See references to news accounts set forth in foot note) *which illustrate the state-wide publicity which the case had received and which would render it highly improbable that a jury selected from the citizenry of any of our 253 counties other than Smith, where he was tried, would not contain a sizeable number who had heard of appellant and his far-flung financial manipulations. Appellant's counsel seems to recognize this fact, because he states in his brief that "Probably no case in this state has ever received the publicity treatment that this case received during the spring, summer and fall of 1962." I quote further from his brief:

San Angelo Standard
TRAVIS COUNTY
Austin American-Statesman
Austin American
Austin Statesman
TRINITY COUNTY
Trinity Standard
VAL VERDE
Del Rio Herald
Del Rio News-Herald
VICTORIA COUNTY
Victoria Advocate
WALKER COUNTY
Huntsville Item
WARD COUNTY
Monahans News
WASHINGTON COUNTY
Brenham Banner-Press
WEBB COUNTY
Laredo News
Laredo Times
WHARTON COUNTY
El Campo Leader News
WICHITA COUNTY
Wichita Falls Times
Electra Star News
Wichita Falls Record-News
WILBARGER COUNTY
Vernon Record
WILLACY COUNTY
Raymondville Cronicle
WILLIAMSON COUNTY
Williamson County Sun (Georgetown)
WINKLER COUNTY
Winkler County News (in Kermit)
Wink Bulletin
WISE COUNTY
Bridgeport Index
WOOD COUNTY
Wood County Democrat (Quitman)
YOUNG COUNTY
Graham Leader
NATIONAL PUBLICATIONS
Farm and Ranch Magazine
Argosy Magazine

*This parenthetical reference and the footnote were deleted when this opinion was withdrawn and refiled after Motion for Rehearing.

"The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon the Estes story giving in detail his life history and the details of the alleged fraudulent transactions out of which this prosecution arose. Said story carried full photographs and illustrations of the defendant's alleged fabulous and fraudulent career.

"The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story."

He poses a dilemma, but does not offer a solution.

The wheels of justice must not stop merely because an accused is of such prominence that he and his alleged misdeeds have been publicized throughout the state. The Supreme Court of Louisiana was confronted with such a problem in State v. Rini, 95 So. 400. See also the recent case of State v. Odom, 369 S. W. 2d 173, from the Supreme Court of Missouri in which the question is fully discussed. Venue should always be changed where the end sought to be accomplished may be achieved, as was done in the Williams case, but all those properly charged with crime must be tried and their guilt or innocence determined. From the record, it is apparent that nothing beneficial to appellant could be accomplished by changing venue countless times.

Morrison, Judge

(Delivered January 15, 1964)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Smith County

Opinion on Appellant's Motion for Rehearing

This conviction was affirmed upon the opinion prepared by Commissioner Dice, approved by the three Judges of this Court. The Concurring Opinion sets out the further views of Judge Morrison.

The opinion prepared by Commissioner Dice is attacked upon numerous grounds.

The motion for rehearing first complains that we erroneously stated that Exhibit 15 pleaded in the indictment was purchased by C.I.T. Corporation for $70,275.

We said: ". . . the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of $94,500 and that after he signed the same it *was re-copied* at the direction of Orr and, *as re-copied*, sold by Superior Manufacturing Company to C.I.T. Corporation for $70,275 . . .."

The appellant correctly points out that the instrument signed by Wilson and set out in the indictment

was re-typed to correct the description "75-100 gallon Superior NH 3 tanks mounted on and together with 75-4 wheel Superior *tanks*," by changing the last word, "tanks," to "trailers," and that Orr, upon the instruction of the appellant, signed or forged the name of Wilson to the re-typed and corrected instrument and it was this instrument that was sold to C.I.T. Corporation.

The fact that the instrument described in the indictment and signed by Wilson was not itself sold and delivered to the C.I.T. Corporation does not affect our conclusion that the instrument signed by Wilson which obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, was of the value of over $50. Wilson's financial statement is in the record and he testified as to its accuracy. He testified that as he left appellant's office, after signing the instrument, he heard the appellant say ". . . he had my paper sold to C.I.T."

The appellant challenges our disposition of his bills of exception relating to the refusal of the court to permit him to interrogate the grand jurors in Reeves County.

We disclaim any intention of holding contrary to our prior decisions in Davis v. State, 374 S.W. 2d 242, and other cases. Cognizance will be taken and relief afforded against the organization of grand juries under circumstances violative of the Constitution.

A grand jury previously impaneled had indicted the appellant. He was not in custody or under bond to await the action of the grand jury impaneled in May. He sought to interrogate the grand jurors for the May Term when they reassembled in July.

Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges.

The clear distinguishment between the case before us and Davis v. State is that in the Davis case evidence adduced at the hearing of the defendant's motion to quash the indictment supported his contention that the grand jury which indicted him was organized under circumstances violative of the Constitution. In the record before us no violation of the Constitution in the organization of the grand jury which indicted the appellant is shown.

The appellant's complaint to our disposition of his Bills of Exception 4 and 23 relating to the trial court's refusal to discharge the jury panel and postpone the trial or grant a change of venue from Smith County is predicated, in a large measure, upon the holding of this Court in Williams v. State, 283 S.W. 2d 239.

The opinion in the Williams case was distinguished both in the Court's original opinion and by its author in his Concurring opinion herein. It is

the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the Williams case should be overruled.

We do not agree that the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639, adopted or announced such a rule. In that case the Supreme Court said that the failure to accord an accused a fair hearing violates even the minimal standards of due process; that a fair trial in a fair tribunal is a basic requirement of due process; that the jurors' verdict must be based upon the evidence developed at the trial, and that the theory of the law is that a juror who has formed an opinion cannot be impartial. The Supreme Court qualified the latter statement as follows:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence pre-

sented in court. Spies v. Illinois, 123 U.S. 131, 31 L.Ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021 31 S.Ct. 2, 20 Ann. Cas. 1138; Reynolds v. United States (US) supra.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' Lisenba v. California, 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S.Ct. 280. As stated in Reynolds, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . .'

. . . 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' . . . As was stated in Brown v. Allen, 344 U.S. 443, 507, 97 L Ed. 469, 515, 73 S.Ct. 397, the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

In Irvin v. Dowd, venue was changed to an adjoining county. In the case before us venue was changed,

**(after the appellant had sought a change of venue), to Smith County, more than five hundred miles from Reeves County where the indictment was returned. The venue was changed on the court's own motion, the court having found that in Reeves County and in all counties adjoining, and in adjoining judicial districts, a trial fair alike to the state and the defendant could not be had.

The holding in Irvin v. Dowd closely parallels the Texas Statute (Art. 616 (13) V.A.C.C.P.) which provides that the court, if satisfied that he is impartial and will render an impartial verdict, may in its discretion, admit as competent to serve in the case a juror who, from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay has formed an opinion or a conclusion as to the guilt or innocence of the defendant where the juror states he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

Whether the trial judge abused his discretion in refusing to postpone the trial or change the venue from Smith County must be determined in the light of the fact that the trial was had more than five hundred miles from the county where the offense was allegedly committed and the indictment returned; the voir dire testimony of the impaneled jurors, and the fact that the newspaper accounts, telecasts, broadcasts and other hearsay upon which some of

**Deleted by order of the Court after Second Motion for Rehearing, no such change of venue having been sought by appellant.

the jurors had formed an opinion were circulated generally throughout the state.

We find no support in the record for the contention made in the motion for rehearing: "Three of the jurors who actually served in this Estes case expressed opinions that defendant was guilty."

The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

We do not, as appellant suggests, hold that there is no county in Texas where the appellant could get a fair trial, nor do we agree with appellant's contention that he could not and did not get a fair trial in Smith County.

Remaining convinced that Judge Dice's opinion correctly disposes of the appeal, appellant's motion for rehearing is overruled.

Woodley, Presiding Judge

(SEAL)

(Delivered March 11, 1964.)

Minutes of the Court of Criminal Appeals of Texas

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Correction to Main Opinion of Motion for Rehearing

Opinion on Rehearing amended by deleting "after the appellant had sought a change of venue," (Par. 2, p. 4).

Woodley, P.J.

April 15, 1964

Certificate of Clerk of Court of Criminal Appeals

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 36,086. styled:

BILLIE SOL ESTES,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee

judgment of the 7th Judicial District Court of Smith County, Texas, was affirmed by this Court on January 15, 1964; Appellant's Motion for Rehearing overruled March 11, 1964; Appellant's Second Motion for Rehearing overruled April 15, 1964, and order staying mandate and all other proceedings, to permit appellant to seek a writ of certiorari from the Supreme Court of the United States, was issued and filed April 16, 1964.

THEREFORE, with the overruling of Appellant's Second Motion for Rehearing, this cause was disposed of by this Court on April 15, 1964, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases. Said judgment has now become final on the docket of this Court and mandate would have issued had not same been stayed on motion of appellant to permit application for writ of certiorari.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 28th day of May, A.D. 1964.

GLENN HAYNES,

Clerk, Court of Criminal Appeals of Texas

APPENDIX B

Constitution
and
Statutes

APPENDIX B

Constitution and Statutes

Constitution of Texas, Article 1, Section 10. Rights of Accused in Criminal Prosecution

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Title 17, Chapter 8, Articles 1411 and 1418, Texas Penal Code, 1925:

Article 1411. *Property must have some value*

The property must be such as has some specific value capable of being ascertained. It embraces every species of personal property capable of being taken.

Article 1418. *"Property"*

The term "property," as used in relation to the crime of theft, includes money, bank bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing evidence of an existing debt, contract, liability, promise or ownership of property real or personal, any receipts for money, discharge, release, acquittance, and printed book or manuscript, and in general any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value.

Title 17, Chapter 16, Article 1545. Texas Penal Code 1925:

Article 1545. *"Swindling" defined*

"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.

Title 7, Chapter 1, Articles 338, 339, and 361, Texas Code of Criminal Procedure 1925:

Article 338. *Shall select grand jurors*

The jury commissioners shall select sixteen men from the citizens of different portions of the county to be summoned as grand jurors for the next term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners.

Article 339. *Qualifications*

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony.

Article 361. *Challenge to array*

A challenge to the array shall be made in writing for these causes only:

1. That those summoned as grand jurors are not in fact those selected by the jury commissioners.

2. In case of grand jurors summoned by order of the court, that the officer who summoned them had acted corruptly in summoning any one or more of them.

Title 7, Chapter 2, Article 374, Texas Code of Criminal Procedure 1925:

Article 374. *Deliberations secret*

The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding one hundred dollars, and to imprisonment not exceeding five days.

Title 7, Chapter 4. Articles 560 and 566, Texas Code of Criminal Procedure 1925:

Article 560. *On court's own motion*

Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and

impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue.

Article 566. *If adjoining counties objectionable*

If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper.

Canons of Judicial Ethics. American Bar Association:

Judicial Canon 35. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract *participants and witnesses* in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization pro-

ceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

Canons of Judicial Ethics, Integrated State Bar of Texas:

Judicial Canon 28. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

(1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage, or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.

Title 10, Article 856, Texas Code of Criminal Procedure:

(Rules adopted pursuant thereto and printed at pp. 139-140 of the 1963 Cumulative Pocket Part of Vernon's Annotated Code of Criminal Procedure of the State of Texas, Volume 3.)

RULE VI

RULES OF THE COURT OF CRIMINAL APPEALS OF TEXAS

VI. Any party desiring a rehearing of any matter determined by the Court of Criminal Appeals may, within fifteen days after the opinion is handed down, file with the Clerk of said Court his motion in writing for a rehearing thereof, distinctly specifying the grounds relied upon for the rehearing.

If the Court hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may be filed by the

losing party within fifteen days after such opinion is handed down; but a further motion for rehearing shall not be made as a matter of right in any other case

Any motion for rehearing may be amended any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the Court any time before its final disposition.

All motions and other matters filed in the Court of Criminal Appeals and not disposed of at the end of the term shall be automatically continued to the next succeeding term of said Court.

APPENDIX C

Count I, Indictment

APPENDIX "C"

Count I

Indictment

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors, duly selected, organized, sworn and impaneled as such for the County of Reeves, State of Texas, at the May A. D. 1962 Term, of the 143rd Judicial District Court for said County, upon their oaths present in and to said Court that BILLIE SOL ESTES on or about the 2nd day of March, 1961, in the County and State aforesaid, by means of false pretenses and devices, and fraudulent representations then and there knowingly and fraudulently made by him to T. J. WILSON, did induce the said T. J. WILSON to sign and place his, the said T. J. WILSON'S, signature on an instrument of writing, and did induce the said T. J. WILSON to deliver to him, the said BILLIE SOL ESTES, and the said BILLIE SOL ESTES did then and there, and by the means aforesaid, obtain possession of and acquire from the said T. J. WILSON, said instrument of writing with said signature affixed thereto conveying and securing a valuable right, the said instrument being of the tenor following:

Michigan, Missouri and Texas

CHATTEL MORTGAGE

C I T — ORIGINAL FOR

Corporation — FILING OR RECORDING

(Do not use this form in any transaction covering motor vehicles in a state prescribing a special contract form therefor)

This Form is Subject to State Legal Requirements
Buyer's (Mortgagor's) Name T. J. WILSON Dated:

MARCH 2, 1961
(Month, Day)

Street Address 1101 SOUTH PLUM

City PECOS County of REEVES State TEXAS

(Where filing is governed by residence and equipment is in same state show (a) for corporation, its principal office stated in its charter, (b) for partnership, its business address and, in the space at the right hereof the name and residence address of each Partner, and (c) for individual, his residence address. Otherwise, show business address of buyer.)

To SUPERIOR MANUFACTURING COMPANY
(Name of Seller-Mortgagee)

4110 NORTHEAST EIGHTH AVENUE
(Street Address of Seller-Mortgagee)

AMARILLO (City) TEXAS (State)

The above-named Mortgagor, meaning all Mortgagors jointly and severally, having been quoted both a time and a cash price, hereby purchases from you, on a time price basis, the following described

personal property, together with all attachments, replacements, substitutions and additions, hereinafter referred to as "equipment":

(Describe equipment fully including make, kind of unit, serial and model numbers and any other pertinent information)

75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH 75—4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

SERIAL NO'S. SF-17214-500 THRU SF-17288-500

65 — SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.

TANK SERIAL NO'S. 8304 THRU 8368

for which Mortgagor agrees to pay you or your assigns $121,850.00 of which $27,350.00 has been paid
(Full Time Price) (Down Payment)
and $—0— is to be paid upon (installation) and
(delivery)
$94,500.00 as balance of purchase price is payable in
(Balance)
60 successive, monthly instalments of $1,575.00
(Insert No. of Months) (Amt. of Each Payment)
each, and one final instalment of $—0—, commencing April 15, 1961, and then on a like date of each
(Month, Day, Year)
month thereafter until fully paid.

Interest shall be payable monthly on unpaid balances at the rate of xxxx% per annum and after maturity at the highest lawful contract rate. All payments are due at C.I.T. Corporation's office, New York, Chicago or San Francisco. If any note is taken herewith, it shall evidence indebtedness, only and not payment. In consideration of said purchase and to secure the above-described balance. Mortgagor hereby grants, bargains, sells, conveys, confirms and mortgages unto Mortgagee all of said equipment;

TO HAVE AND TO HOLD said equipment unto Mortgagee and Mortgagee's sole use forever. Mortgagor covenants that Mortgagor lawfully possesses said equipment and owns it unencumbered and will warrant and defend said equipment against all claims and demands of all persons.

Said equipment shall be kept at: No. 1101 SOUTH
(Street, Address)
PLUM, City of PECOS, County of REEVES, State of TEXAS, but shall remain personal property and not become part of the freehold.

PROVIDED, NEVERTHELESS, that if Mortgagor pays Mortgagee said balance in money, as stated above, this mortgage shall be void, otherwise to remain in full force and effect.

AND PROVIDED FURTHER, that Mortgagor may retain possession of said equipment until any default hereunder.

Mortgagor agrees: to procure forthwith and maintain fire insurance with extended or combined

additional coverage on the equipment for the full insurable value thereof for the life of this mortgage plus other insurance thereon in amounts and against such risks as you or assigns may specify, and promptly deliver each policy to you or assigns with a standard long form endorsement attached thereto showing loss payable to you and assigns as respective interests may appear; your acceptance of policies in lesser amounts or risks shall not be a waiver of Mortgagor's foregoing obligations to pay reasonable attorney's fees for enforcing rights after buyer's default, all risk of loss, damage or destruction shall at all times be on Mortgagor; to pay promptly all taxes, assessments, license fees and other public or private charges when levied or assessed against equipment or this mortgage or any accompanying note; to satisfy all liens against the same. Time is the essence; if any of said debt be not paid promptly when due or if equipment be removed or disposed of or encumbered, or whenever you or assigns shall deem equipment or the debt insecure, all unpaid instalments shall become immediately due and payable and Mortgagor agrees to return equipment to you or assigns on demand, and you or assigns may, to the extent permitted by law, without notice or legal process enter any premises where equipment may be and take possession of it. Mortgagee may foreclose this mortgage in the manner provided by law and to the extent not prohibited by law equipment may be sold with or without notice at private sale or at public sale, with or without having equipment at the sale, at which you or assigns may purchase, and the proceeds thereof, less expenses of

retaking, repairing, holding, reselling and reasonable attorney's fees (15% of the unpaid balance, if not prohibited by law), credited upon the amount unpaid and Mortgagor will pay the balance forthwith as a deficiency for the breach of this mortgage, any surplus however, to be paid to Mortgagor

Waiver of any default shall not be a waiver of any other default all your rights are cumulative and not alternative, if you assign this mortgage you shall not be assignee's agent for any purpose; Mortgagor will settle all claims, defenses, set offs and counterclaims it may have against you, directly with you, and not set up any thereof against your assignee, you hereby agreeing to remain responsible therefor; no waiver or change in this mortgage or related note, shall bind such assignee unless in writing signed by one of its officers. Upon full payment of this mortgage, assignee may deliver all original papers to you for Mortgagor. No oral agreement, guarantee, promise, representation or warranty shall be binding. Mortgagor waives all exemptions and homestead laws and acknowledges receipt of a true copy hereof. If any part hereof is contrary to, prohibited by or deemed invalid under the applicable laws or regulations of any jurisdiction, such provision shall be inapplicable and deemed omitted but shall not invalidate the remaining provisions hereof.

T. J. WILSON

(Signature of Individual or name of Corporation or Partnership)

By /s/ T. J. Wilson

Signature of Buyer-Mortgagor

Title OWNER

(If Corporation have signed by President, Vice-President or Treasurer and give official title. If Owner or Partner, state which)

Witness

Witness

(Signature of Two witnesses, necessary only in the State of Texas)

ACCEPTED:

SUPERIOR MANFACTURING CO.

By_____

Signature of Seller-Mortgagee

Title VICE PRESIDENT

(If Corporation, give official title. If Owner or Partner, state which.)

ORIGINAL FOR FILING OR RECORDING

which said instrument of writing was then and there of the value of more than Fifty ($50.00), and the property of T. J. WILSON, and the said BILLIE SOL ESTES did then and there obtain possession of and acquire the same as aforesaid, with the intent to appropriate the same to his own use, and with the intent of destroying and imparing (sic) the right of the said T. J. WILSON, the party justly entitled to the same in this, to-wit, the said BILLIE SOL ESTES did then and there falsely pretend and fraudulently represent to the said T. J. WILSON that the said T. J. WILSON by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, to-wit:

75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH 75—4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

SERIAL NO'S. SF-17214-500 THRU SF 17288-500

65 — SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65—200 GALLON NH3 TANKS.

TANK SERIAL NO'S. 8304 THRU 8368,

and that the said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, and did thereby fraudulently induce the said T. J. WILSON, who relied upon said false pretenses and fraudulent representations and believed them to be true, to sign and place his, the said T. J. WILSON'S, signature on said instrument of writing and to deliver the possession of the said instrument of writing to him, the said BILLIE SOL ESTES, when in truth and in fact the said T. J. WILSON was not purchasing the property listed and specified in said instrument of writing, and said property did not secure said instrument of writing and was not security thereon, and the said BILLIE SOL ESTES then and there knew the said pretenses and representations were false: against the peace and dignity of the state.